

# **Comment on Proposed Mercury Emission Rule Changes**

**October 14, 2001**

Environmental Law Society, University of Wisconsin Law School

The University of Wisconsin Law School Environmental Law Society supports the proposed mercury emission rule changes. We have looked at the disparate impact of environmental exposure to methylmercury on particularly vulnerable groups, such as minority groups, women, and children. In our opinion the current allowable mercury exposure is inadequate to protect these groups. The proposed DNR rule changes do not decrease the amount of mercury in our environment, however the rules do begin to curb the otherwise increasing threats to vulnerable populations. Furthermore, it is always desirable to continually reduce the poisons in our air, water, and food.

## **Minority Groups.**

Simple economic trends often force people to feed their families from alternative, less expensive sources. Minorities eat 1.5 sport-fish meals for every 1 eaten by whites (1998).<sup>1</sup> A UW study showing the risk to minority anglers posed by contaminated fish to

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<sup>1</sup> - *"To Fish or Not to Fish: Environmental Justice and Mercury Contamination in Dane County"*, Robyn Autry, Elena Bennett, Dana R. Fisher, Jefferson Hinke, Greg Sass, Kaelyn Stiles.

be more than 1000 times EPA's "safe levels"<sup>2</sup> should be disconcerting to all policy makers. Only about one-fifth of minority anglers are aware that mercury advisories exist.

Wisconsin has a growing population of Asian-American people, many of whom may be unable to read the English-language advisories. Nationally, these populations have twice the average rate of contaminated fish consumption. This is largely due to the incorporation of larger amounts of fish into their diets.<sup>3</sup> Similarly affected are Native Peoples, Hispanics, and lower-income people of all groups. Native Americans in relevant particular have relied upon the fish of Wisconsin for half a millennium or more, and view fishing as essential to their culture and survival.

African-American anglers are also at increased risk. This population suffers a 30% higher incidence of excess exposure vis-à-vis the white population. Another study, recently conducted in Detroit, found these groups more likely to view fishing as a food source than were "white" anglers. African-American fishers are more likely to eat species

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<sup>2</sup> -Taken from a letter entitled "Clean Water, Safe Fish letter for the governors" to governors of Great Lakes States from Brett Hulsey, Great Lake Program Director, Sierra Club. 12/8/1997

<sup>3</sup> Mercury Update: Impact on Fish Advisories, US EPA, Office of Water, 9/99

with higher contaminant levels and are less likely to be informed about mercury contamination advisories.<sup>4</sup>

### **Children.**

The most vulnerable group to any environmental threat is children. Cancer is a leading cause of childhood deaths. Recent years have shown sharp increases in leukemia and brain cancers among the youngest of our population.<sup>5</sup> Sadly, we have created these risks in our children. Doctors recognize significant associations between childhood cancer and environmental factors.<sup>6</sup> Additionally, behavioral and mood problems, birth defects, reproductive disorders, and decreases in intelligence have all been associated with mercury and other heavy metals in the environment.<sup>7</sup> Children must rely on others, including government, to protect them from health risks. It is therefore not surprising that there is a recent movement to adapt environmental standards to better protect children.<sup>8</sup>

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<sup>4</sup> Autry, et al. Supra.

<sup>5</sup> Mercury Update, supra at 1101, 1108.

<sup>6</sup> Id.

<sup>7</sup> United States Environmental Protection Agency, EPA's Children's Environmental Health Yearbook 2 (1998), note 6, at 45.

<sup>8</sup> Miner, Jennifer C., Do Environmental Laws Adequately Protect Children's

The EPA has determined that children are at greater risk from environmental dangers for three basic reasons: 1) children's systems are still developing - including rapid changes in growth and development, immature body organs and tissues, and weaker immune systems in infancy; 2) children eat proportionately more food, drink more fluids, and breathe more air per pound of body weight; and 3) children are least able to protect themselves.<sup>9</sup> Despite these facts, most environmental standards are set to protect "the average, healthy adult, not children."<sup>10</sup> For example, though knowing the disparate impact of environmental dangers on children since our nation's first days, Congress did not address these dangers to children until 1996.<sup>11</sup>

President Clinton and the EPA made the adaptation of environmental laws to

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Environmental Health? A Review of Existing Laws, Potential Legislation, and Policy Considerations, Comment. Oregon Law Review, Winter 1999. 78 Or. L. Rev. 1101.

<sup>9</sup> U.S. Environmental Protection Agency Executive Summary, Environmental Health Threats to Children, EPA 75-F-96-001, September 1996.

<sup>10</sup> Id., citing Physicians for Social Responsibility, Children's Health Platform (1999).

<sup>11</sup> Id., see also Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489 (1996), codified at 7 U.S.C. § 136, 21 U.S.C. § 301 and 21 U.S.C. § 346a.

better protect children a priority.<sup>12</sup> So far however, only two national laws have incorporated children's health provisions.<sup>13</sup> More change is on the horizon. Several children environmental health bills have been introduced in Congress, including several currently being considered.<sup>14</sup> These bills have strong support among Wisconsin's congressional delegation; many of them cosponsoring such bills.<sup>15</sup> The EPA is also focusing on children's environmental health.<sup>16</sup> These National movements must compel

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<sup>12</sup> Exec. Order No. 13045, 62 Fed. Reg. 19885 (1997); United States Environmental Protection Agency, EPA's Children's Environmental Health Yearbook 2 (1998 and 2001 supplement.); Environmental Health Threats to Children EPA 75-F-96-001.

<sup>13</sup> Food Quality Protection Act of 1996, *supra*; Executive Order 13405, (directs federal agencies to assess environmental health risks to children when significant policies, programs, activities and standards may disproportionately affect children).

<sup>14</sup> S.1112, 106th Cong. (1999), introduced again as S.855 107th Cong. (2001) and S.940 107th Cong. (2001); H.R. 1990 107th (2001); H.R. 199 106th Cong. (1999); H.R. 1657 106th Cong. (1999).

<sup>15</sup> *Id.*

<sup>16</sup> EPA Yearbook, *supra* note 6, at 2; Browner, Carol M., Proposal for Environmental Regulatory Reform Colloquium: Environmental Regulatory Reform, 15

Wisconsin's priorities as well. The current rule changes provide an opportunity. Mercury contamination in the environment endangers the health of Wisconsin's children.

An EPA committee studying environmental health risks to children recommends addressing insufficient mercury standards as the most important child focused policy change.<sup>17</sup> The original National Emissions Standards were calculated at a rate too high to adequately protect children.<sup>18</sup> The EPA acknowledges this inadequacy and is acting to reevaluate regulations to consider the elevated risk of contaminants to children.<sup>19</sup> EPA has recently completed a mercury report to Congress assessing the presence of mercury and its environmental health implications.<sup>20</sup> However, EPA is still studying the specific

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Pace Envtl. L. Rev. 45, 46 (1997).

<sup>17</sup> Id. at 1124.

<sup>18</sup> Id.

<sup>19</sup> Rega, Jennifer J., The EPA's National Agenda to Protect Children's Health from Environmental Threats: The Trend to Better Protect Our Nation's Children from Environmental Health Hazards, Comment. 7 Dick. J. Envtl. L. & Pol'y 119 (Winter 1998).

<sup>20</sup> <http://www.epa.gov/children/whatepa/national.htm> (visited September 30, 2001).

dangers to children.<sup>21</sup> Though the DNR's proposed reductions do not account for the increased danger to children by adopting a "reference dose" set for children rather than the average adult<sup>22</sup> the rules are a significant first step.

A critical look at history shows that concern for children's health often results in rigorous protection. Twenty years ago, the federal government banned lead in gasoline and paint as steps toward reducing the serious effects of lead on children.<sup>23</sup> Today's children deserve no less protection from mercury. Significantly, despite opposition at the time, these regulations were surmountable by industry. While the federal government has begun to address the issue it continues to move slowly. Wisconsin has the opportunity to protect its children today and must.

### **Women.**

Women who are exposed to mercury bio-accumulated in fish are of special concern, because mercury ingested by women of child-bearing age can pass to developing

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<sup>21</sup> Id.

<sup>22</sup> Wisconsin Department of Natural Resources, Draft Decision on the Need for an Environmental Impact Statement, at p. 9.

<sup>23</sup> Rega, *supra*, at 128.

fetuses and cause neurological defects.<sup>24</sup> These defects range from cerebral palsy to learning disabilities.<sup>25</sup> Thus, the State of Wisconsin has issued warnings to nursing mothers and women of child-bearing age to refrain from eating fish that might be contaminated with mercury.<sup>26</sup> These edits affect a large number of women; for example, a woman of child-bearing age is defined by the United States Environmental Protection Agency (EPA) as a woman from fifteen to forty-four years of age.<sup>27</sup> Thus, many women in Wisconsin and the surrounding Great Lake States have been limited in their choices of what they may eat because of mercury contamination.

While nursing mothers and women of child-bearing age may elect not to eat

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<sup>24</sup> United States Environmental Protection Agency, *Mercury White Paper*, available at <http://www.epa.gov/ttn/oarpg/t3/memoranda/whtpaper.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> Wisconsin Department of Natural Resources, *Mercury Advisory Update*, available at <http://www.dnr.state.wi.us/org/water/fhp/fish/advisories/mercuryup.htm> (last update Aug. 24, 2001).

<sup>27</sup> United States Environmental Protection Agency, *Mercury Study Report to Congress: Overview*, available at <http://www.epa.gov/airprog/oar/mercover.html> (Sept. 5, 2001).



mercury-contaminated fish because of their health risks, it can hardly be said that this choice was made freely. The only foreseeable way for women to regain control over their choice of what to eat is for the Wisconsin DNR to significantly restrict the amount of mercury that fossil fuel-burning power plants may emit. That is why individuals agree to government in the first place: because government is the only entity that can prevent one private citizen from encroaching on the liberties of another.<sup>28</sup> A democratic society such as ours protects individual liberties by passing laws and regulations for the public health, safety, and welfare.<sup>29</sup> Wisconsin's proposed mercury rule is such a regulation. Thus, not only is the proposed mercury rule a good tool to protect the health and liberties of Wisconsin women, but it may be the only tool.

To summarize briefly, all people are affected by the quality of the environment. Those groups and individuals who rely upon food sources such as fish may be more

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<sup>28</sup> John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, SOCIAL CONTRACT 75 (Oxford Univ. Press) ("But though men when they enter into society give up the equality, liberty, and executive power they had in the state of nature into the hands of the society . . . yet it being only with an intention in everyone the better to preserve himself, his liberty and property").

<sup>29</sup> *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U.S. 548 (1914) ("[T]he power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community ... can neither be abdicated nor bargained away, and is inalienable even by express grant").

directly affected by mercury's persistence and accumulation in the food-chain. Because minorities may be unaware of the effects of mercury accumulation, further steps must be taken to reduce the danger of contamination of a principal food source. The predominance of fish in Wisconsin diets has both cultural and economic roots, which must be respected and protected by the state in whom the citizens entrust their most vital resources.

Respectfully submitted for consideration, October 15, 2001.

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